CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT, OCTOBER TERM, 1827.

HOLSTEIN vs. *HENDERSON.*

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APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The plaintiff states that she is the owner and proprietor of a certain tract of land lying in the parish of Rapides, on the bayou Cotile, containing ten arpents front, with the ordinary depth of forty. That heretofore, she instituted a suit against the defendant, in which she recovered fifty-seven arpents of land by the decree of the Supreme court, that quantity being supposed to be contained within the lines by which her title was limited, when, in fact, and in truth, there is contained, within said lines,

The authority to give more necessarily includes that of giving less.

The inferior court must carry into effect the decree of the supreme court, as the former understands it.

But the latter may interfere if its decree be misunderstood.

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the quantity of 97 arpents and a fraction, actual survey, and for which surplus, above the quantity adjudicated to her, she is entitled to recover.

The defendant pleads *res judicata*, a better title to the premises, and lastly, that the supreme court, through error of computation, decreed to the plaintiff a larger quantity than she ought to have had.

The nature of the titles under which the parties claim, the situation of the land which was then, and is now, in dispute; the respective dignity of their titles, and the reasons why the court considered that of the defendants of a higher degree than the plaintiff's, are fully stated in the opinion pronounced when the case, to which this is in every respect similar, was before the court. It is reported 12 *Martin*, 319.

This action, as the recital of the principal averments in the petition has already shewn, is brought on the idea that the lines to which the plaintiff was limited by the decree of this court, contain 97 arpents and a fraction, when, through error, only 57 67-100 were adjudged to her.

The court have examined, with particular care, the judgment rendered by them in the

former suit, and they are unable to find the slightest foundation on which this pretension can rest.

From what was then stated, it appears that the contest between the parties, related to a narrow strip of land lying on the bayou Cotile, containing, according to the evidence then before the court, 279 73-100 arpents.

The court then said, "if it should turn out in the investigation, that the titles of plaintiff and defendant call for the same land, it is our opinion that the plaintiff cannot recover, for they are not merely equal in dignity; that of the defendant is superior."

With the opinion of the higher dignity of the defendant's claim, it is obvious that the plaintiff must totally have failed in that action, if the whole of the title of the former could have been legally located on the tract in dispute. But from the calls of that title, the court thought, and we still think correctly, that only one half of it could be satisfied on that side of the bayou, and this half not amounting to the whole of the superfices, on which both claimed to locate their claims, it followed that the balance belonged to the plaintiff.

This was not only the necessary result of

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considering the defendant's title as the best, but it was almost the express language of the court; after stating its superiority, and defining its location, we proceeded to observe, "under this view of the rights of the defendant, *there will remain* within the limits of the tract of land already mentioned, 57 67-100 arpents of land to which, we conceive the plaintiff has exhibited title."

If, therefore, in any other part of the opinion, the court had been so unfortunate in the language adopted by it, as to have given limits to the plaintiff to claim more than the remainder which might exist within the limits already stated, those expressions would have been contradicted by the declaration of the higher dignity of the defendant's claim, by the expression of our opinion that it was to be first satisfied; that the plaintiff was only entitled to the residue; and lastly, by the decree itself, confining the plaintiff to that precise quantity, which had been already stated, remained, after the defendant's title *was* satisfied.

But not one word can we find, either in the opinion of the court, or in the decree rendered, which gives lines to the plaintiff's title which would include a greater quantity than that spe-

cified by the court. The opinion says nothing of it; the decree is in these terms, "that the plaintiff do recover of the defendant, 57 67-100 arpents of the land claimed in his petition, to be taken from the upper side of the tract of 279 73-100 arpents represented on the plot beginning at A on said survey, returned in the cause, and to be laid out so as to include the original settlement of Thomas Choate."

Most properly, therefore, did the defendant set up the plea of *res judicata*, to the pretension advanced in this suit. The rights of the parties to all the land lying between the lines of Vallery and Grubb's claims, were fully investigated in the former action; and if they were now before us on the merits, we see nothing which could give additional strength to the plaintiff's demand.

The defendant pleaded that the supreme court committed an error of computation in its first judgment, by giving the plaintiff a larger quantity of land than that which really belonged to him; and the court below, considering that the suit before it was to carry into effect the former decree of this court, corrected what it conceived to be an error in calculation, and directed the plaintiff to be put in possession of

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a smaller portion than that specified in the judgment of this tribunal.

The plaintiff has strongly complained of this, as, in effect, reversing the decision of this court, and making that below the controlling, instead of the subordinate tribunal. This complaint comes with a bad grace from him, as his own petition, in substance, required the inferior court to alter the decree rendered by the tribunal. For if it could have given the plaintiff forty additional arpents of the same land, respecting which the parties once litigated, and judgment had been rendered, it is not easy to see why, on the same principle, it might not have reduced the quantity adjudged to him. The authority to give more, necessarily included that of giving less.

It is true, as the judge states, that when the decrees of this court go down to the inferior court to be carried into effect, their execution must be ordered as that tribunal understands them, subject, however, to our revision, if it does not interpret them correctly; and it is true that understanding must be gathered from the whole terms of the judgment. But he erred in supposing this was a suit to carry into effect the judgment of this tribunal. From the evidence

laid before us, it appears the decree of the supreme court rendered in the suit between these parties in the year 1822, was carried into effect in 1823; and that the land which the plaintiff there recovered, had been measured and surveyed for her.

And he erred in supposing this court committed any mistake in the calculation which it made from the evidence before it. This error is, however, more excusable, as it is one into which the parties led him, by both contending that such a mistake had been made. A concession the more remarkable, as it is in direct opposition to the evidence introduced in the former cause, on which they suffered the court to act without opposition, and after having acted on it, acquiesced in its conclusions by failing to make application for a re-hearing.

In the record of the suit formerly decided here, is found a plot of survey made after notice to the parties, and used by both of them on the argument in this court. It is there stated, that the quantity of land contained between the lines of Grubb and Valery, is 279 73-100 arpents. We committed, therefore, no error when on that evidence, and it was the only evidence before us as to the quantity, we came to

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the conclusion that, after deducting 221 6-100 arpents from 279 73-100 arpents, there remained 57 67-100 arpents.

But it appears from the evidence adduced on the trial of this cause, that the quantity within these limits is only 240 48-100. If such be the fact, this evidence ought to have been produced in the other case, and in acting on this evidence, it is manifest the court below was not correcting errors of calculation into which this tribunal had fallen, but making deductions from the new proof before it.

Another question in the case, however, remains. The defendant contends that as the plaintiff has opened the judgment by bringing suit to have it altered, the whole matter is now before us on its merits, and should be decided on the additional evidence. That he waives the plea of *res judicata* in his answer, and that the court cannot supply it.

Admitting him to have a right to do so, this case does not authorise a judgment in reconvention. There is no such prayer in the answer. The demand is, not for a new judgment in this suit, but that an error in the former decree of the supreme court should be corrected. The error complained of could not furnish a

ground for a plea of nullity, and that cannot be done indirectly, which the law will not allow to be done directly.

It is therefore, ordered, ajudged, and decreed, that the judgment of the district court, be annulled, avoided, and reversed; that there be judgment in favor of the defendant, with costs in the court below; those of appeal to be paid by the appellee.

Thomas for the plaintiff, *Wilson* for the defendant.

GILL vs. *JETT*.

APPEAL from the court of the sixth district.

Altho' the party against whom a witness is examined on interrogatories, may not be entitled to cross examine—if his opponent consents to his doing so, and gives him notice of time and place, the latter may not deceive him, by taking the deposition elsewhere, and on another day.

MARTIN, J. delivered the opinion of the court. This is an action of slander, in which the defendant had a verdict and judgment, and the plaintiff appealed

His counsel relies on a bill of exception taken to the rejection of two depositions, the reading of which, was objected to because they were not taken at the time and place mentioned in a notice given to the defendant's attorney.

The plaintiff's counsel urges, that the testimony was taken under the 424th article of the

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Code of Practice, on interrogatories annexed to the commission, a copy of which, had been served on the defendant's attorney—that in these circumstances no notice being required by law, the plaintiff cannot be injured by the one he gave; that in similar cases, the party served with a copy of interrogatories, is to add his, if any he has—that the justice who executes the commission, must confine the examination of the witnesses, to the matters stated in the interrogatories, and that neither party has a right to attend, and put to the witnesses any interrogatories, besides those annexed to the commission, and consequently, as the attendance of either party cannot be of any use, no notice is requisite, and the magistrate may consult his convenience and that of the witnesses, as to time and place.

Although the party against whom the deposition of a witness, examined on interrogatories, is taken, may not be entitled, under the Code, to cross examine him; nothing prevents this being done with the consent of the party who produces the witness.

In the present case the plaintiff very liberally notified the defendant, of the time and place, at which the commission was to be executed,

and informed him he was at liberty to be present and cross-examine. This dispensed the defendant or his attorney, from the trouble of preparing interrogatories. But the plaintiff had no right, after the liberality he had exercised, to deceive the defendant, by examining the witnesses at another time and place, than those stated in the notice.

On the merits, we see no reason to disturb the verdict.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be affirmed with costs.

Boyce for the plaintiffs, *Thomas* for the defendants.

MARTIN vs. *RUTHERFORD & AL.*

A mistake in writing the sum for which the judgment appealed from, was rendered, is fatal.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The petition of appeal in this case, states, that at the May term, of 1825, of the district court, a final judgment was rendered against the plaintiff; that there is error in it, and that, therefore, an appeal is prayed to the supreme court.

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The judgment appears to have been rendered at the November term, 1824, and the appellees have prayed that the appeal may be dismissed, the judgment really rendered in the cause, not having been appealed from.

The appellant contends, this objection is cured by the joinder in error, filed by the appellees, in which they state that there was no error in the judgment of the district court.

Appearing and pleading to the merits, waves all errors of form, and irregularities in the manner the appellee has been brought into court: but cannot cure such a defect as that which these proceedings present. No appeal has been taken from the judgment rendered. No issue has, or can be joined, on the judgment really given, for the answer can only apply to the judgment complained of in the petition; and that judgment does not appear to have ever been rendered.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Boyce for the plaintiff, *Oakley* for the defendant.

REEVES & AL. vs. BURTON & AL.

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An attorney is a good witness, when he is not called on to disclose facts that came to his knowledge when consulted in his professional capacity.

In testing the competency of a witness, the main question is, whether the judgment to be rendered may be given in evidence in a future suit against him.

The surety is affected by notice of the assignment of the debt given to the principal.

APPEAL from the court of the sixth district.

MATTHEWS, J. delivered the opinion of the court. In this case, the plaintiffs sue as transferees of Montgomery, who sold to them all his right and interest in the successions of his father and mother, to which the defendants are alleged to be debtors, in consequence of the purchase of property belonging to said succession, by Burton, one of the defendants who remained mortgaged for the payment of the price, and for the assurance, whereof Martin the other defendant, became surety in the obligations which were given for the debt.

The defendants plead a release executed to them in consideration of a compromise and payment made to the transferor, before the transfer was made, or at least, before they had notice thereof.

Judgment was rendered in their favor in the court below, from which the plaintiffs appealed.

The decision of the cause depends, principally, on the investigation of a bill of exceptions taken to the competency of a witness, offered on the part of the defendants, and to the admissibility of part of his testimony. The opposi-

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tion in relation to incompetency, is based on two grounds. 1. That the witness is attorney in the cause. 2. On account of interest. The first is clearly untenable, as he is not required to disclose any facts, the knowledge of which was acquired confidentially in the pursuit of his profession. The objection, on account of interest, arises out of his situation as purchaser of part of the property mortgaged, as above stated, to secure payment of its price. As has been already shewn, Burton purchased at the sale of the succession of Montgomery, the father of the transferor to the plaintiffs; and afterwards sold to Martin, his surety, who sold to Russel, he to Baldwin, and the latter to Thomas the witness, who appears to be now, proprietor of a certain portion of the land on which a right and privilege of mortgage is claimed.

In testing the competency of a witness, the main question which arises, is:—Can the judgment, about to be rendered, be legally received in evidence in any suit which may subsequently be brought against the witness, relative to the matters litigated in the action wherein he is brought to testify.

The witness, in the present case, is then, by the evidence, to be in the situation of one, in our

law, denominated, *a third person.* He holds property subjected to a mortgage, by which it was encumbered previous to his purchase, and is offered, to prove a release of that mortgage, granted by the creditor to his vendor and debtor, before the witness became proprietor, by a chain of titles, regularly deduced from said debtor. This is an hypothecary action, prosecuted, in pursuance of the provisions of the C. Code, and should the plaintiff succeed in obtaining judgment against the principal debtor, by the express terms of the law, it becomes evidence, in a pursuit against the third possessor, to have the mortgage property sold. It is therefore clear, that the witness offered has a direct interest, to prevent a judgment from being obtained against the principal debtors, as that judgment would be legal evidence against him; in truth, the very basis of every subsequent proceeding *in rem*, which may take place, to effect a sale of the mortgaged premises, whilst in his possession. According to this test, he is evidently incompetent.

The conclusion to which we have arrived, on this bill of exceptions, renders it unnecessary to examine that which relates to the receiving oral testimony, to prove the contents of a

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a written release, said to have been executed in 1823, and alleged to have been lost. The proof of loss, as exhibited by the testimony, would probably have authorised a substitution by oral evidence. But as the witness is incompetent, no part of his testimony can be received. A subsequent release, is set up in defence, which, by a comparison of dates with the act of transfer to the plaintiffs, is found to be posterior in time. This circumstance would not impair its validity, if it should appear to have been executed, prior to the debtors having received notice of the transfer. The evidence on record shews, that they had a knowledge that the debt was transferred to the appellees, before the alleged payment, or satisfaction to the original creditor, and execution of the release on his part. It is true, that no formal notification appears to have been given by the plaintiffs; but the defendants derived knowledge of the fact from one of the former. The testimony seems to confine this knowledge to Burton alone: now, as he is the principal debtor, we are of opinion, that it must affect the rights and privileges of his sureties, as they were not bound to pay, and could not regularly volunteer a payment, without requir-

ing the principal to be first pursued. They might have paid, and been subrogated by the creditor to all his rights on the debtor; but in the case before the court, it appears, that the creditor had transferred the rights to the plaintiffs, and that the debtor had notice of the transfer. The obligation of the sureties being accessory, must follow and abide the fate of that of the principal.

According to this view of the cause, the plaintiffs have clearly established a right to recover the amount claimed in the petition.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed, and annulled; and it is further ordered, &c. that the plaintiffs and appellants, do recover from the defendants and appellees, the sum of two thousand one hundred and sixty dollars, with interest, at the rate of ten per cent. per annum, on one third part of said said sum, from the 1st of April, 1820—also, interest on the remaining two thirds, at the same rate, on one, from the 1st of April, 1821, and on the other, from the 1st of April 1822, with costs in both courts.

Johnston for the plaintiff, *Oakley* for the defendant.

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WILSON vs. *BAILLIO & AL.*

The Code of Practice reached the Parish of Rapides on the 3d of October, 1825.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appellee moves to dismiss the appeal in these cases on two grounds.

First, because the appeal has been taken too late.

Second, because the bond was not given according to law.

The judgment rendered in these cases, bears date the 2d of May, 1825. The order of the judge, granting the appeal, is of the 31st October, 1826. The code of practice declares, that no appeal will lie, except as it regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered; if the party claiming the same, reside in the state, and after two years, if he be absent therefrom. *C. Prac.* 593.

The appellee in the instance before us, is neither a minor, nor has she been absent from the state, and the statement already made shews that nearly 18 months had elapsed from the time judgment was rendered, until the appeal was taken. The conclusion, therefore, that it is too late, and must be dismissed, is so ob-

vious, that no observations would be necessary from the court, were it not for a question which has been raised in relation to the time the law already cited, was in force, in the parish.

The code of practice, it is said, was not promulgated in the parish of Rapides twelve months before the appeal was taken, and the appellee has been called on to shew when it was first in force here. She answers this by shewing the law to be in force *now*, and relies on a late act of the legislature, which provides, that whenever the promulgation of a law is contested, the person contesting the same, shall be held to prove the fact. It is unnecessary for us to express any opinion on whom the *onus probandi* lies in cases such as that before the court, for, by the endorsement, on the copy of the code of practice, forwarded for the use of this tribunal it appears to have reached here the 3d October 1825, and from that time until the appeal was taken, more than one year had elapsed. *Acts of Leg.* 1827, 172.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Wilson for the plaintiff, *Thomas* for the defendant.

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GANIOTT vs. *HAVARD.*

A judgment against the assignee of part of a debt on the ground that he acquired no interest by the assignment, forms no *res judicata* against the original creditor.

After the death of a partner, the affairs of a firm may be carried on in the social name, for the benefit of the survivor and the heir of the deceased.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This action is brought on a bond, by which the defendant bound himself as surety, to one McCrummin, who had replevied a quantity of cotton, seized in an action which the plaintiff instituted against him. The petition states, that judgment was recovered against McCrummin for $800, with interest, and costs, amounting to $42 62 1-2—that he is insolvent, and that the defendant is responsible for the amount, with the exception of $300, which the plaintiff has transferred to one Hollaway, and which he does not make claim to. He states that he sues for the use of King & Beatty, and Isaac Thomas.

The defendant pleads, that the plaintiff never did transfer to King & Beatty, and Thomas, the balance due on the bond. That the matters and things growing out of the demand in the petition, have already been adjudicated on in the supreme court, and have acquired the force of *res judicata.* That the principal in the bond, McCrummin, has paid the plaintiff the amount claimed in the petition, and

more, for which overplus, the defendant is entitled to judgment in re-convention. And lastly, that the plaintiff cannot parcel out the bond to different persons.

There was judgment in the district court, in favor of the plaintiff, for $542 62 1-2, with interest, at five per cent. on $500, from the 26th November, 1823, until paid. The defendant appealed.

In this court, the defendant has made the following points:

1. The judgment is for $542 62 1-2, when the prayer was only for $500.

2. The attempt to prove, that the plaintiff had funds in the hands of the principal in the bond, is too vague to merit notice. *C. Code*, 2257.

3. *Res judicata.*

I. The prayer in the petition, is not for $500 alone; but for $500 and interest, and forty-two dollars 62 1-2, the amount of costs incurred, in the suit wherein the sequestration issued. There is, therefore, no foundation for this objection.

II. We think the evidence fully justified the judge *a quo*, in concluding, that the sums pleaded as a set-off, by the defendant, were

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compensated by another sum, which the principal owed the plaintiff, on an account different from that for which this bond was given.

III. The plea of *res judicata*, is not supported. The judgment which is offered as evidence of it, was given in a suit where assignees of a part of this debt were plaintiffs, and their claim was rejected, on the ground, that a creditor could not, by assigning a portion of his claim to several persons, give a right of action to each against his debtor. In this case, the creditor himself, sues for the whole balance due. There are neither the same parties, nor the same subject matter.

In addition to the points filed, it has been urged in argument, that there is no such person as Beatty; that he is dead. This may be true, and the plaintiff's right to recover remain unaffected. The suit is not brought for the use of Beatty, but for the use of King & Beatty, and it is a frequent occurrence, that partnerships, by the terms of contract, last after the death of one of the members, and are continued under the *nom social* for the benefit of his heirs. The plea filed in this suit recognises this fact, for it does not assert there was no such firm as that set out in the petition, but

there was no such person as one of its members.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Thomas for the plaintiffs, *Oakley* for the defendants.

WM. WILSON vs. *BAILLIO & AL.*

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The case presents the same facts, and is governed by the same law as that of Maria C. Wilson vs. J. L. Baillio and others, just decided.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Wilson for the plaintiff, *Thomas* for the defendant.

LEVESQUE vs. *ANDERSON.*

APPEAL from the court of the sixth district.

In whatever manner one may bind himself, he shall be bound.

MARTIN, J. delivered the opinion of the court.

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A witness who testifies against his interest, is a good witness.

The appellee has moved for a dismissal of the appeal on the ground that the condition of the bond is not *verbatim* the one required by the article of the code of practice, in which the surety is bound only in case the appellant, being cast in this court, does not pay the amount of the judgment, and it cannot be made out of his property.

The condition of the bond given, binds the surety, immediately on the appellant being cast and failing to pay.

We think the objection ought not to prevail; the appellee is more amply secured by this bond than by that required by law; and we have held that in whatever manner one binds himself, he shall be bound.

The plaintiff sues the defendant, administrator of the estate of Louisa Hoffman, to procure the rescision of the sale of a slave, bought by the former at the sale of the state. There was judgment for the plaintiff and he appealed.

His counsel took a bill of exceptions to the opinion of the district court, who rejected Lalla Hammon, a witness offered by the defendant, to prove the redhibitory vice, on the ground that she is one of the persons entitled to the succession of Louisa Hoffman, whose estate the

defendant administers, and consequently has an interest in the event of the suit.

Administrators are appointed to the estates of beneficiary heirs, and of persons entitled to a succession who desire time to deliberate whether they shall accept the succession. *Civil Code*, 1031, 1034. In the present case, it is not shewn that the witness has accepted the succession; admitting that she has, she comes to testify against her interest, by diminishing the amount of the estate, and is a good witness

But it is urged she is a party to the suit, a defendant, Anderson being a nominal one, and having no personal interest in the suit, and that the testimony of parties to a suit can be obtained by interrogatories only.

She is not actually a party to the suit, although she may derive some advantage from the judgment in favor of the actual defendant; the plaintiff could not have made her a party to the suit, for he was bound to direct his claim against the administrator. He therefore had no means to avail himself of her testimony by interrogatories.

We think the judge erred in rejecting her.

It is therefore, ordered, ajudged, and de-

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creed, that the judgment be anuulled avoided and reversed, the verdict set aside, and the case remanded, with direction: to the judge to permit the testimony of Lallah Hammon to go to the jury; and it is ordered that the appellee pay costs in this court.

Boyce for the plaintiff, *Oakley* for the defendant.

STYLES vs. *M'NEIL'S HEIRS.*

If the transferee neglects to give notice of the transfer to the debtor, payment compulsorily made by the latter to the transferor, destroys the transferee's right against the debtor.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. In April, 1820, Curtis transferred to the plaintiff a judgment against Hall, which had been duly recorded, and on the death of Hall, revived against his executors; it does not appear that notice of the transfer was ever given by the plaintiff to the executors or heirs of Hall. In 1822, Curtis, notwithstanding the transfer, took out an execution on the judgment, and had it levied on a tract of land, which had been the property of Hall, and which his widow and executrix had purchased at a sale which she had provoked in the court of probates, of the property of the estate. She obtained an injunction,

the dissolution of which Curtis proved. Curtis dying soon after, his mother as his forced heir, employed Baldwin to put the judgment into execution; a tract of land that had been the property of Hall till his death, was accordingly seized and sold, and Baldwin became the purchaser of it, who afterwards transferred it to the ancestor of the defendants.

The plaintiff has instituted his action of mortgage and has prayed that unless the defendants pay the amount of the judgment, the premises may be sold to satisfy the judgment transferred to him by Curtis. He had judgment, and the defendants appealed.

In the deed of sale, from Baldwin to the defendants' ancestor, the latter declares himself cognisant of the manner in which the vendor purchased the premises, and takes on himself every risk about the title. So that the question is, whether Baldwin acquired a good title under the sheriff's deed.

We think he did. The plaintiff, by the transfer, acquired an inchoate title to the judgment which he neglected to complete by giving notice of the transfer. *Civ. Code*, 368, *art.* 22. He stood silent during several years, while the transferor remained the ostensible owner of the

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judgment. He suffered his transferor and his heirs to continue the exercise of ownership on the judgment.

Let it be granted that Curtis' heirs are legally presumed cognisant of his acts, and consequently of the transfer, nothing shews that Baldwin had the least knowledge of it, and that he did not purchase in good faith.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the plaintiff's petition be dismissed with costs

Thomas for the plaintiff, *Boyce* for the defendants.

GILL vs. *PHILLIPS & AL.*

The certificate of a jailor, of the death of a prisoner, is not legal evidence.

If the testimony leave it doubtful whether notice to file cross interrogatories was given, the deposition ought to be rejected.

APPEAL from the probate court of the parish of Rapides.

PORTER J. delivered the opinion of the court

The petition states, that the plaintiff recovered a judgment in *solido*, against John & Abraham Phillips, and that in that suit, certain property was attached; that in consequence of the mother of the defendants having interpleaded in that action, and claimed the objects seized, as

making a part of the succession of Isaac Phillips, deceased; her husband, the judge of the district court, had ordered a partition of the property should be made before the court of probates. It further states, that there is much more property in the same situation in said parish, which the petitioner has a right to have partitioned; and that the widow had sold and made use of more of the succession of her husband, than that which had fallen to her share. It concludes, with a prayer that the partition should be made; that the property not attached, should be sequestered to prevent its being removed from the state, and that the widow should be held to account for the property that was wasted.

When fraud is not in issue, evidence cannot be given of the consent to a sale of slaves.

An account referred to in a deed of partition, is evidence against the heirs.

The court of probates has power to decide on sales of the immoveable property of a succession.

The court of probates, on motion being made to it, to carry this decree of the district court into effect, was of opinion, that it could not proceed otherwise than in the ordinary way of partition.

With this decision, the parties appear to have acquiesced; and the next thing which appears on record is, an answer of James L. Phillips and Richard L. Phillips, stating that they are heirs of Isaac Phillips, deceased, and bretheren of John & Abraham Phillips; that

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the plaintiff has no right to sue for, or provoke a partition of any property, belonging to the succession of Isaac Philips, deceased; that a partition has already taken place between the heirs of the succession, and those who represent them, by which all the property mentioned in the petition, was assigned to the respondents for their share in the succession as heirs, and also, to satisfy debts which said succession owed them—and finally, that John & Abraham Phillips, in whose right the plaintiff claims a partition, have long since received their portion of their father's estate.

On these pleadings, after a great deal of evidence, oral and written, was heard, the court of probates decreed, that a partition of the estate of Isaac Phillips, assigning the widow one half thereof, and the other half to his children, James L. Phillips, Richard L. Phillips, John Phillips and Abraham Phillips, in equal parts; and that in order to effect this partition, that a sale should take place. The court further decreed, that this partition should be confined to the property in possession of the widow and heirs, and that it should not extend to the property which has been disposd of by them.

On the trial of the cause, the defendants and

appellants, offered in evidence the certificate of the de puty sheriff of New Orleans, who has charge of the state prison, to shew the period when a person confined in the penitentiary had died. This evidence was objected to as not being the best which the nature of the case was susceptible of. Of this opinion was the court, and rejected it.

We think it did not err. Admitting it was the duty of this officer to keep a record of the deaths of the persons committed to his custody, and that a copy from this record could be evidence, the certificate offered did not purport to be such. It is merely a statement by the jailer, that a prisoner in his custody had died. This was not the best evidence of which the case was susceptible. The oath of the person certifying, would have been higher and better proof, and consequently, the inferior evidence could not be received.

The second bill of exceptions taken by the defendants, was to an opinion of the judge rejecting certain depositions, on the ground, that notice had not been regularly given to the plaintiff, so as to enable him to file cross-interrogatories.

The proof in relation to the opportunity of-

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fered to put the cross-interrogatories, leaves it doubtful whether it was given or not, and as the burthen of proving it devolved on the party wishing to use the interrogatories, the depositions were properly rejected.

The third was taken to the testimony of a witness, to shew that one of the heirs used certain declarations, when two of the others made a conveyance of certain slaves. We think the judge erred in admitting this evidence. If the heir had made the conveyance by parol, it could not be given in evidence against him; therefore, his assent to another mans conveying it, cannot be proved by oral testimony. If fraud had been expressly charged against him, and the parties had joined issue on it, then perhaps, this proof would have been admissible; but nothing of the kind appears on the pleadings.

We are also of opinion the judge erred, in rejecting an account referred to in the fourth bill of exceptions. The account was referred to in an instrument, setting forth a partition of the property, passed in the state of Alabama, and which instrument was signed by all the heirs but one, who was represented by his mother. Whether this partition was fraudu-

lent, and made with the intention of defeating the claims of the creditors of some of the heirs, is a question totally distinct, from the legal right of introducing the document in evidence. It was objected to, because, one of the parties to a suit cannot make evidence for himself. This is most true, but though he cannot make evidence for himself, he can use in evidence, what those opposed to him in interest, have acknowledged against themselves, though these acknowledgments should be made in an act to which he was a party. In this suit, the plaintiff claims, in right of two of the heirs, and every thing which they did *bona fide* in relation to the estate, is evidence against them.

This cause must, therefore, be remanded, but in directing that course to be taken, we think proper to remark, that we perceive an error in the final judgment, and as the acting on the same principle, in the decree which the probate court may again render, would create expense and delay, and finally cause a reversal here, it is better to settle the question now We do this the more readily, as the point was fully argued, on the hypothesis, that we should be obliged to go into the merits.

By the terms of the judgment, the inventory

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and appraisement, are limited to the property in possession of the widow and heirs, and that portion which had been disposed of by them, is expressly excluded; the court being of opinion it had no power to decide on the validity of these sales, and the notary is directed to make a partition between the parties of this property.

That the court of probates has no power to decide directly, on the validity of sales of real estate, or to try titles thereto, is a position to which this court readily accedes. But that court possesses all powers necessary to carry its jurisdiction into effect, and when in the exercise of that jurisdiction, questions arise collaterally, it must, of necessity, decide them, for if it could not, no other court could. It is immaterial, whether these questions arise out of the sale of land, slaves, or in any other manner, if the examination of them is necessary to the decision of the issue joined. Any other construction would present a singular species of judicial power. The right to decree a partition, without the authority to inquire into the grounds on which it should be ordered, or the portions that each of the parties should take. The *end* would thus be conceded without the

means. But the rule in all cases of this kind is, *cum quod conceditur, conceditur et hoc, per quod pervenitur ad illud.* This point was decided at the last term of the court, for this division of the western district, in the case of *Baillio* vs. *Wilson.*

The court of probates, therefore, did not want the power to decide on sales of the slaves, and immoveables of the succession, and if any such were made by the heirs, it was its duty to have passed on them, and then to have sent the parties before the notary to make up the account, and allot the share to each. There cannot be a question, that if some of the heirs of the succession, sell property belonging to it contrary to law, they are responsible to the co-heirs, for so much as they have thus illegally disposed of; and it would be doing a great injustice, to permit them to take a share of the effects that remained, when that part which they had alienated, amounted to, perhaps, more than their portion. An article in our Code, declares, that the notary in making the partition shall include in the account, those sums which each of the co-heirs may owe, by reason of damages or injury, which may have been caused by his fault to the effects of the succession; a *fortiori*

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must be included what he owes, when he has made away with them altogether.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates, be annulled, avoided and reversed, and that this cause be remanded for a new trial, with directions to the judge not to admit declarations of one of the heirs, at the time a sale was made by others, and not to reject the account referred to in the fourth and last bill of exceptions, taken by the defendants, on the ground, that the parties could not make evidence against themselves, and it is further ordered, that the appellee pay the costs of this appeal.

Thomas, for the plaintiff, ***Scott, Johnston & Boyce*** for the defendant.

OAKLEY vs. *PHILIPS.*

If the interest on which the right to appeal be denied in the sup. court.—the case must be remanded.

APPEAL from the court of probates of the parish of Rapides.

MARTIN, J. delivered the opinion of the court. This is an appeal from an order of the court of probates, admitting the appellees as heirs of the deceased. The appellants were not parties in

the court of probates, but intervened after judgment, by praying for an appeal, which was granted, on their suggestion that the judgment was to their injury.

The appellees have denied that the appellants have any interest that authorises their intervention. We have no means to try the issue thus presented; and in trying it we would not reverse the judgment of another tribunal, but take original cognizance of the rights of the appellants.

The case must therefore be remanded to the court of probates, that they may ascertain the truth or falsehood of an allegation made by the appellants, and denied by the appellees. We have lately given the same directions in two cases in the eastern district.

It is therefore ordered, adjudged, and decreed, that the case be remanded to the court of probates, with direction to the judge to enquire into the claim of the appellant to the appeal.

Oakley for the plaintiff, *Boyce* for the defendants.

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M'NUTT, vs. *BOYCE*, *Syndic.*

An overseer is not a domestic within the meaning of the old Civil Code, 488 art. 77.

APPEAL from the court of probates of the parish of Rapides.

PORTER, J. delivered the opinion of the court. The plaintiff claims sixteen hundred dollars from the defendant for his wages as an overseer on the estate of the insolvent. The general issue and the prescription of one and three years, is pleaded.

The facts proved, fully establish the justice of the plaintiff's claim. The argument in this court has turned wholly on the plea of prescription; the defendant contends that the plaintiff falls within the denomination of "domestics" spoken of in the 77th article of the old code, "who let their services by the year." *C. Code*, 488, *art.* 77.

We are of a different opinion; the word *domestics* applies to those servants who are employed in the house, and not to those who are engaged in conducting and managing the affairs of a plantation.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Flint for the plaintiff, *Boyce* for the defendant.

PHELPS & AL. vs. OVERTON.

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APPEAL from the court of the sixth district.

A citation of appeal is improperly served on the attorney on record, when the appellee resides in the state.

MARTIN, J. delivered the opinion of the court. The dismissal of this appeal is prayed because the citation was not served on the plaintiffs and appellees in person.

The return shews a service on the attorney on record.

In the petition, the plaintiffs are stated to be residents of the city of New-Orleans, and a residence out of the state is neither proven nor alleged.

It is clear the service was not correctly made. *Code Prac.* 582.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Scott for plaintiffs, *Flint & Johnston* for defendants.

BROUSSARD vs. PHILIPS.

The third possessor can not be called on till thirty days after a demand on mortgagor.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff complains, that Ogden having sold to Philips a slave, whom he had pre-

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viously mortgaged to the plaintiff, Philips sent him out of the state to prevent the exercise of the plaintiff's right on the slave; that Ogden has no visible property, and the plaintiff is likely to lose his debt. Judgment is prayed *in solido* against both defendants.

Ogden filed no answer, Philips pleaded the general issue. There was a verdict and judgment as prayed for, and Philips appealed.

The third possessor has his option to pay the debt or surrender the property. He may, therefore, without injury to the creditor, remove or sell it. If he sell it, he is discharged, if he remove it he must pay or bring back the property mortgaged.

But he cannot be called on till thirty days after a demaud made on the mortgagor. *Code of Practice*, 48, 70.

In the present case, there is no other evidence of the plaintiff's call on the mortgagor than the present suit which the plaintiff was not authorised to bring till thirty days after the demand. There is no evidence of Ogden's alleged insolvability.

It is therefore ordered, adjudged and decreed, that that the judgment of the district

court be annulled, avoided, and reversed; that there be judgment as in case of non-suit, and that the plaintiff pay costs in both courts.

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Boyce for the plaintiff, *Scott* for the defendant.

WELLS vs. *HUNTER*,

APPEAL from the court of the sixth district.

If the defendant plead that the injunction was improperly issued by a judge of another district, when that of the district was absent, he cannot give, in evidence, that the plaintiff is without title, as the slave was brought into the state contrary to law.

PORTER, J. delivered the opinion of the court. The petitioner states that he and his co-heirs have inherited from their father a certain slave who has been seized and taken out of their possession by the sheriff of Rapides, acting under the orders and by the direction of the defendant.

On these allegations, an injunction was granted, and the defendant answered the petition by a plea that the injunction had erroneously issued from the judge of the seventh district, when that of the sixth was not absent.

On this issue, the defendant in the court below, gave evidence to shew that neither the plaintiff or defendant could have any right, title or interest to the slave; that he had been introduced as contraband

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The plaintiff objected to the introduction of this evidence, and the court erred in admitting it. The plaintiff's title was not at issue by the pleadings.

As we agree in opinion with the judge *a quo*, that possession enables the plaintiff to maintain the injunction, it is unnecessary to go into the question whether a forfeiture for a breach of positive law can be set up and examined collaterally, in cases circumstanced like that before the court.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Johnston for the plaintiff, *Johnston & Flint* for the defendant.

BAKER vs. *VOORHIES.*

The party who takes a deposition must see that the interrogatories of his opponent be answered.

The clause in a private bill of sale, by which the vendor ack-

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The petition states that the plaintiff sold to Woods, a slave, by a private writing, on which he acknowledged the receipt of the price, although it was not paid; that the vendor

is dead, and the defendant, curator of his estate, is about to sell the slave for cash, contrary to law. The prayer is, that the plaintiff may have judgment for the price, and that the defendant may be enjoined from selling the slave for cash.

The defendant pleaded the general issue; that the injunction was asked, merely to create delay.

The injunction was dissolved, the defendant had judgment, and the plaintiff appealed.

The defendant's counsel relies on a bill of exceptions taken to the opinion of the court of probates, who refused leave to read the deposition of his witnesses, taken by commission and on interrogatories, on the objection of the defendant and appellee, that his interrogatories, added to those of the plaintiff, were not answered.

It is urged, if a defendant withhold the answers to his interrogatories, or otherwise prevent their appearance, or if the magistrate is in fault, the plaintiff ought not to suffer. It is true, that if it be through the act of the defendant, that the answers to his interrogatories do not come up, the plaintiff ought not to suffer; but the plaintiff should shew the interference of the defendant, if he wishes to avail himself of it.

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This is not done in the present case. It appears the defendant added his interrogatories to the plaintiff's; this is all that he was bound to do. The plaintiff was then to have the commissions *duly* executed and returned. If it be not so, the depositions cannot be read, for the reading of them would do injury to the defendant, who is in no fault; the plaintiff who undertook to procure testimony, must suffer the consequence if by accident or otherwise, the testimony does not arrive in such a plight as to be used. The testimony was therefore correctly rejected.

On the merits, the plaintiff has admitted, in the bill of sale he received the price. The bill is posterior in date, to the promulgation of the new civil code, which provides that "the acknowledgment of payment made in an *authentic* act, cannot be contested under the pretence of the exception *de non numerata pecunia*, which is hereby *abolished*," 2234,

It is contended that the first branch of the article relating to *authentic* acts only, the latter must be confined to cases in which there is such an act; otherwise the adjective *authentic* has no meaning; to this it may be answered, that if the exception be abolished, in cases of authentic acts, the whole of the last branch of

the article is without use, for in the first branch, the legislator had *virtually* though impliedly abolished the exception.

Farther, the bill of sale being acknowledged, has, between the parties, the *same* credit as an *authentic* act. Ib. 2239. To this act acknowledging the receipt of the price, and being entitled to the same credit as an authentic one, the acknowledgment in it cannot be contested.

But the injunction was claimed by the plaintiff, not only as creditor of the price, but as a creditor of other sums due by the estate; of this there was not a tittle of evidence produced.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the court of probates be affirmed, with costs.

Boyce & Gorton for the plaintiff, *Thomas* for the defendant.

BARKER vs. *VOORHIES, Curator.*

APPEAL from the court of the sixth district.

The appeal will be dismissed if the judge who grants it does not fix the sum for which

MARTIN, J. delivered the opinion of the court. The defendant and appellee contends that this case is not properly before us; the judge having granted the appeal without stating the amount

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of the surety to be given, nor a day on which the transcript was to be returnable.

The plaintiff presented his petition, praying an appeal to the next term of the supreme court. The judge endorsed the following order on the back of the petition, "let the appeal prayed for be granted."

security is to be given on the return day.

The code of practice requires that the judge in granting an appeal, shall state, at the foot of the petition of appeal, the amount of the security to be given by the appellant, and the day on which the appeal shall be returned.—574.

Nothing of this is done in the present case; not a word about any security is mentioned in the order on the petition; no return day is stated in the order; neither is any determined by a reference to the petition, in which the appeal is prayed to be returnable at the term; nothing stating any particular day thereof.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Boyce & Gorton for the plaintiff, *Thomas* for the defendant.

SCRIVINER vs. *MAXEY'S HEIRS.*

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The appeal will be dismissed if the bond be not payable to the appellee.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The appellees have moved to dismiss this appeal, the bond not being given according to law. It appears to be made payable to the governor of the state, instead of the appellees. It is most clearly not such as the law requires.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs.

Patterson for the plaintiff, *Scott* for the defendants.

DAVISON vs. *CHABRES' HEIRS.*

If the vendee be not subrogated to his vendor's right of warranty, he cannot resort to the warrantors of the latter.

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. The petitioner states that she is widow of one Dominique Davison, who, on the 18th June, 1811, purchased, from the ancestor of the defendants, a slave called Adelaide, with her three children. That at the death of her husband, in the year 1814, she purchased the said slaves with their increase, and by the conditions of said sale, she became subrogated in the right

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of warranty stipulated by Chabres in favor of her deceased husband.

She further states that she continued in possession of said slaves, and was at great trouble and expence in maintaining them and their increase, and that she has been evicted from the possession of them by a decree of the supreme court, and that in addition to the loss of the slaves, which were worth $4000, she expended $1000 in defending the suit.

That Chabres the vendor to her husband, has departed this life, leaving as heirs, Carmelite Chabres, the wife of L. Hazleton, and F. Chabres; that they have taken possession of his estate, and have done various acts as pure and simple heirs of their ancestor. That they have also accepted the succession of their mother, who was, at the time the warranty was stipulated in the sale to the petitioner's husband, in community with the ancestor of the defendants. And that by reason of all these things, the defendants have become liable to pay to the plaintiff, the sum aforesaid, more particularly, as they have had notice of the suit by which she was evicted, but failed or refused to defend it.

By the first answer filed, the defendant pleaded.

1. The general issue.

2. That they are not the immediate warrantors of the plaintiff.

3. That they had not notice of the suit. That if they had, they had a good defence to make to it.

4. That they are not responsible *in solido*, but if at all, only for their virile share.

5. That Francis Chabres, one of the defendants, was a minor when his father and mother died, and cannot be answerable for more than one fourth of his father and mother's estate.

And lastly—That they were both minors when their father died; that his estate was worth nothing, and that they cannot be made responsible out of their own property.

In the first amended answer, they further pleaded:—

That if the negroes sued for and recovered from the petitioner, ever were in possession of Case, the plaintiff in that cause, they were his property, and not his wife's; that the petitioner lost them through her own negligence, and failed to notify the respondents, and call them in warranty. That if they were sold as the property of Case, it was for a debt contracted during the marriage with his wife, for which she

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was responsible, and that she was otherwise stopped from claiming the negroes from the present plaintiff. That the negroes sold by the ancestor of the defendants were purchased at Sheriff's sale, as the property of D. Case, at the suit of Wm. Montgomery of New-Orleans, and that they are bound in warranty to him.

This answer concludes with a prayer that the representative of Case & Montgomery may be cited in warranty.

The second amended answer only repeats certain averments contained in the first.

The third, averred that the plaintiff had a perfect title to the slave from which she was evicted by prescription, but she failed to shew that David Case was the original debtor of Montgomery, and was equally bound with his wife for the payment of the mortgage under which said slaves were sold.

That if the respondents are at all bound in warranty, they are only bound for one half so much of the price paid, as the probable length time which the slaves have yet to live, may be assessed to be worth.

The curator of Case pleaded that the district court had no jurisdiction of the case, that all claims against the estate, he represents, must

be brought in the Court of Probates.—Montgomery, who was also cited in warranty, answered, by denying all the allegations in the answer of the defendants; and that he is not responsible in warranty.

Evidence in support of the allegations contained in their pleadings was introduced by the parties, and the court below gave judgment of non-suit, on the ground that the defendants were not the immediate warrantors of the plaintiff, and could not in the first instance, maintain an action against them.

The general rule certainly is, that the vendee, in an ordinary contract of sale, who has not taken an express subrogation of his vendor's right of warranty on the person from whom he bought, cannot, in case of eviction, maintain an action against the first seller. The only difficulty we have had in coming to a conclusion in this case, is, whether it did not present an exception to the rule. It has occurred to us that the wife being in community with her husband, at the time the sale was made to him, the warranty for one half at least, of the property extended to her as partner, and that the circumstance of her having bought the whole of t at the probate sale of the community effects,

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would not destroy that right; or, in other words, that she would be at liberty to refer back to her original right, as vendee, of the ancestor of the defendants. We are not, however, to be understood to express a positive opinion on this point. It is not free of difficulty, and the facts, as proved in evidence, do not require of us an opinion in relation to it.

It appears that the sale to the plaintiff's husband was during their marriage, and it is a presumption of law that the effects found in the possession of husband and wife, at its dissolution, are common property. But in the instance before us, that presumption, if not destroyed, is greatly weakened by the title introduced by the plaintiff herself, from which it appears, that the slaves were bought by her, not at the sale of the property held in community, but of the succession of the husband. The answer of the plaintiff, when sued by the person by whom she was evicted, contained the same averment. This leaves the case doubtful; and as the duty of making it clear, devolved on the plaintiff, we are not authorised to reverse the judgment of the court below.

It is therefore, ordered, adjudged, and decreed that it be affirmed with costs.

Thomas for the plaintiff, *Boyce & Johnston* for the defendant.

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HUGHES vs. *HOOK'S HEIRS.*

APPEAL from the court of the seventh district.

The supreme court cannot take cognizance of a case referred to it by a district court, without an appeal having been prayed for and granted.

PORTER J. delivered the opinion of the court. This case commenced originally in the court of probates, and from the judgment rendered therein, an appeal was taken to the district court. The cause stood there for several years, and, on being called up, the judge, conceiving he had no jurisdiction, referred it to this court, and it comes before us on this order, without an appeal being either applied for, or granted.

We can take no cognizance of it. If the judge below, believed he had no authority to try the case, he should have dismissed it, or sent it before the court of probates.

It is therefore ordered, adjudged, and decreed, that the case be dismissed at the costs of the party who brought it here.

Scott & Wilson for the plaintiff, *Downs* for the defendants.

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YOCUM vs. *BULLIT & AL.*

Property fraudently sold by the defendant, cannot be sold under an execution against him, 'till the sale be set aside. Such a sale cannot be set aside, in a suit to which the vendee is not a party.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. This is an action against a sheriff and the plaintiff on a fi. fa., on which the present plaintiff complains that several slaves of his were illegally seized to satisfy a judgment against a third party, and prays that he may be quieted in his title and possession, that all future proceedings in the case may be enjoined, and past ones annulled and avoided; and that he may recover damages.

Bullit, the sheriff, pleaded he levied the execution, as sheriff, according to the directions of the other defendant, the plaintiff therein.

Ball pleaded the general issue, that the slaves seized were the property of the defendant in the execution, and the conveyance to the present plaintiff, is fraudulent and void; that it is a donation, and is void for want of acceptance; that it was not recorded in the parish of Natchitoches.

There was a verdict and judgment for the defendants, and plaintiff appealed.

The record shows the slaves were conveyed by the defendant in the fi. fa., by a sale under

private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent, it must be regularly set aside, by a suit instituted for that purpose. It was not less a sale, and binding upon third parties, until declared null in an action which the law gives; *Curia Phil. Revocatoria n.* 2; and the possession of the vendee was a legal one, until avoided in due course of law. *St. Avid & Al.* vs. *Weimprendre's Syndics*, 9 *Martin*, 649.

The same point was determined during the last term in the eastern district, on which we held that a conveyance, alleged to be fraudulent, cannot be tested by the seizure of the property, or estate belonging to the vendor; and an action must be brought to annul the conveyance; *Barbarin* vs. *Saucier.*

The plea of the sheriff cannot avail him. He was authorised to seize the property of the defendant in the execution and became a trespasser by seizing that of a third person. The instructions of the plaintiff aff rd him no protection.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that

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the defendant be enjoined from any proceedings on the seizure of said slaves; and the case be remanded to assess the plaintiff's damages.

There is a plea in a supplemental petition, in which it is stated, that a sale has taken place on which a twelve months' bond was taken, the cancelling of which is prayed. This, we think, cannot be done. We do not see that the plaintiff has any interest in requiring it. It could not be ordered without setting the sale aside, which cannot be done in a suit to which the vendee is not a party.

It is further ordered that the defendants pay costs in this court.

Rost, for the plaintiff, *Morris & Thomas* for the defendants.

ARPINE'S HEIRS, vs. *HARRISON & WIFE*.

APPEAL from the court of the seventh district.

The possessor of land cannot avail himself of prescription, till he performs the condition imposed on him by the act under which he entered.

MATTHEWS, J. delivered the opinion of the court. This suit is brought to recover from the defendants, a tract of land, which the plaintiffs claim as a part of the succession of their ancestor. The cause was submitted to a jury in the court below. who. under a charge from the

judge, found a verdict in favour of the plaintiffs, and judgment having been pronounced, in pursuance of said verdict, the defendants appealed.

The charge of the judge was excepted to by the counsel of the appellees, as having been given contrary to the provisions of the code of practice, by interfering improperly with the facts of the case. We have considered this charge attentively, and are of opinion that it relates to questions of law which would arise out of the facts, according as the jury should find them.

After verdict and judgment, the defendants moved for a new trial on the ground of newly discovered evidence. Affidavits of discovery are frequently made in desperation, and ought to be received under great restrictions. The witnesses must be designated, and a certain and clear knowledge of what they will prove, should be laid before the court, in such a manner as to shew that the testimony expected will be admissible on the pleadings, and pertinent to the issue. In the present case, one of the defendants states in his affidavit, for the purpose of procuring a new trial, that he hopes to prove, by the newly discovered witnesses, that Barney, under whom they claim, had fulfilled

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his obligation, arising out of a contract of exchange, which forms the basis of the plaintiff's action; all he professes to know on the subject is derived, not from the witnesses, but from other persons whom he does not name. This affidavit is made, too, for the purpose of procuring proof in direct opposition to the stipulations of the written contract, which recognizes but one mode by which the person, from whom the defendants derive title, could discharge the obligation directly imposed on him by it. We therefore think the judge *a quo* was correct in refusing a new trial.

The answer contains a plea of prescription, founded on a possession of 20 years, the plaintiffs being non-residents of the state. The testimony shows that they have only arrived at the age of majority, one of them nine years since, and the other about five; and during the minority, prescription could not legally run against them, neither could it run against the ancestor until the possessor performed the conditions imposed on him, by the act of sale, which he has not done. The evidence of the case does not support this plea.

The merits of the case depend, principally on the act of exchange between the ancestor of

the plaintiffs and Barney, under whom the defendants claim; and the latter having failed entirely to comply with the conditions of that contract, on their part; and it being shewn by the evidence that it is now impossible that they ever can, we are of opinion that the verdict and judgment of the court below are correct; by which the contract of exchange was annulled, and the property in dispute, decreed to the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Downs for the plaintiff, *Scott* for the defendant.

THOMAS vs. *CALLIHAN'S HEIRS.*

APPEAL from the court of the sixth district.

A judgment of nonsuit forms no *res judicata*.

A *sous seing privé* has no effect on the rights of third parties, till its date be fixed by something *dehors* the instrument.

MARTIN, J. delivered the opinion of the court. In this case, the plaintiff claims, as transferee of John Stafford, the amount of a judgment which the latter had obtained against the ancestor of the defendants. They oppose, to his right to recover, a plea of *res judicata*; and also compensation, by virtue of a judgment

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which Leroy Stafford had obtained against the transferor to the plaintiff, three-fourths of which they allege, were regularly transferred to them, or three of them, before any notice was given of the transfer of J. Stafford's judgment against their ancestor.

Leroy Stafford intervened in the cause, and set up a claim to the judgment against Callihan, the ancestor, in consequence of a right acquired under a sheriff's sale, wherein that judgment, or J. Stafford's interest in it, had been seized by virtue of an execution issued at his instance, on the judgment which he had obtained against said John.

The district court rendered judgment in favour of the plaintiff, from which the defendants appealed.

There are two bills of exception in the cause taken by the counsel of the defendants; but as they have no close connection with the principles on which the case must be decided, it is thought needless to notice them.

The claim of the intervener, which seems to be the most formidable, when opposed to that of the plaintiff, so far as it is supported by the seizure and sale of the judgment against Callihan, the ancestor, may be at once dismissed.

as they purport to be of a judgment obtained in May term, 1824, while it appears that the one really transferred from J. Stafford to the plaintiff, was rendered in November term 1823. This circumstance appears to have escaped the attention, both of the counsel and the court in the former suit between the present parties, which is now pleaded as *res judicata*, a plea which cannot avail the appellants, as judgment of non-suit was pronounced in that case.

All questions relative to the conflicting claims of the parties being still open to investigation, they must be in reference to the facts and law of the cause. The facts which are important to its decision may be limited to the transfer of the two judgments, under one of which the plaintiff claims rights which are opposed by the defendants, by those which they attempt to deduce from the other.

In 1823, J. Stafford obtained a judgment against the defendants for $1245 52; subsequently, Leroy Stafford obtained a judgment against John for $950 dollars. Immediately after the latter had obtained his judgment, he transferred it to the plaintiff, which, together with the transfer, was recorded in the office of the parish judge, of the parish of Rapides.

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On the 1st. of October, 1824, Leroy transfered three-fourths of the judgment which he had obtained against John. These transfers were both made by acts under private signature, and consequently cannot affect the rights of third persons, until their dates be verified by something *dehors* the instruments. In all transfers of debts, according to the provisions of our codes, notice to the debtor is required, to give them effect against third parties. *Old Code*, 368, *art.* 122; and *New Code*, *art.* 2613.

By the act of transfer from J. Stafford, of his judgment against the ancestor of the defendants, to the plaintiff, the latter acquired a full and complete right to the debt, as against the transferror; the assignment placed him in the situation of the latter, leaving the judgment subject to seizure by the creditors of the assignor until the notice, required by law, was given to the debtors. In the present case, they claim a right to compensate a debt acquired by transfer, from L. Stafford, against that which the plaintiff holds as transferee from J. Stafford.

In relation to these, the appellee is in the situation of a third person, and as there is no evidence of notice to the debtor of the transferee's rights, the plaintiff cannot be affected by that

assignment and transfer. Nothing is proven which gives a date to the instrument of transfer made by L. Stafford to the appellants. That made by J. Stafford to the appellee, obtained a date by being recorded in the office of the parish judge, and proof of notice to one of the heirs of J. Callihan, on the 11th of October, 1823. No legal seizure had been made of the judgment now claimed, and required to be enforced against the heirs of Callihan, previous to the institution of proceedings against said heirs, in which the original creditor, who had transfered to them a part of his debt, has joined. All parties interested have, by their proceedings, received notice of the transfer made to the plaintiff of the debt which he claims, and this, previous to any right acquired by them, which can affect his claim.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff, *Boyce & Oakley* for the defendants.

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BAILLIO & AL. vs. *MARIA C. & WM. WILSON.*

Sickness of leading counsel, is good ground for a continuance.

Tutor rendering account should be allowed a reasonable time to answer objections to his account.

APPEAL from the court of probates of the parish of Rapides.

MATTHEWS, J. delivered the opinion of the court. This suit is brought by a number of persons (alleging themselves to be creditors of the late James H. Gordon) against his widow, as trustee of his minor children, and her present husband, Wm. Wilson, to compel them to render an account of the administration of the estate of the deceased, since it came into the hands of the tutrix. An account was rendered, and several of the items therein placed as credits to the defendants, were rejected by the court below, as not having been supported by legal testimony; and, to the opinion of the judge *a quo* by which he rejected those items, bills of exception were taken; and also, to a refusal to grant a continuance claimed by her, on the ground of the sickness of her leading, and, indeed, only attorney. The motion for the continuance was supported by affidavit, stating that fact, and the impossibility which the tutrix laboured under in consequence thereof, to render a full account.

The court of probates proceeded to a clas-

sification of the claims of the creditors on the estate, and ordered payment accordingly, from which the defendants appealed.

In examining the bills of exception, we have concluded that the court below erred in refusing the continuance claimed on the ground of sickness of the counsel. It has been determined in several instances in the supreme court sitting in the eastern district, that the sickness and consequent incapacity of leading and principal counsel in a cause, to attend to it, is a good ground on which to obtain a continuance.

In relation to the other bills of exception to the opinions of the judge, by which he rejected the items of credit, we are of opinion, that time ought to have been allowed to the tutrix, to support them by other testimony, which she might be able to procure, in reasonable delay. The acknowledgment, and payment of debts by tutors and curators, which they know to be owing by the estate which they administer, may be considered as prima facie evidence of the correctness of their proceedings; and when in the settlement of their accounts, such items are contested, reasonable time should be accorded to them to shew the truth and legality of their recognitions, and payments.

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In the present case, exceptions to the account offered by the defendant, were not filed until the day of trial, and the discussion of the cause was hurried in such a manner, as to leave no time to the appellants to support the correctness of their account, by destroying the objections raised by their exceptions.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided, and reversed. And it is further ordered, &c. that the cause be remanded to said court, to be tried *de novo*, and that the appellees pay the costs of appeal.

Thomas, Flint and Scott for the plaintiffs, *Wilson* for the defendants.

STRONG vs. *MORGAN.*

APPEAL from the court of the seventh district

MATTHEWS, J. delivered the opinion of the court. In this case, the plaintiff claims from the defendant, $1582 for work and labour done for the benefit of the former. The case was submitted to a jury, who, after hearing the evidence, and a charge from the judge, found a

verdict in favour of the plaintiffs for $303 64; for which amount, judgment was rendered, and the defendant appealed.

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The decision of the cause depends principally on matters of fact; which, we believe, were correctly found by the jury.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Downs for the plaintiff, *Scott* for the defendant.

MILLIGAN'S HEIRS vs. *HARGROVE.*

APPEAL from the court of the sixth district.

Plats of survey, unless issuing with the title, or assented to by one of the parties, do not make evidence *per se*.

PORTER, J. delivered the opinion of the court. This action is in relation to a tract of land which the petitioners claim in virtue of a title emanating from the Spanish government. The defendant's title is founded on a purchase from the United States.

The right of pre-emption accorded by the act of congress of 1814, is not such a title as enables the settler to plead prescription before the time he purchases.

The plaintiffs' has also been confirmed by our government, so that the main question in the cause was, as to its location. On this point,

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a vast mass of contradictory evidence was given in the court below, and a jury, to whom the case was submitted, found for the defendant.

According to the well-settled jurisprudence of this court, that verdict, founded on doubtful testimony, must prevail, unless it should appear, some errors in law were committed, in placing the evidence before the jury.

The plaintiffs complain of several;—in the admission of illegal testimony, and in the charge of the court.

On the trial, the defendant offered in evidence, a plot of survey executed by the principal deputy-surveyor of the United States, purporting to be a true representation of the surveys of the private claims, therein specified, and of the manner and extent in which they interfere with each other, as they have been surveyed and returned to the office by the deputy surveyors." This document was objected to on the grounds "that it constituted no part of the defendant's title, that it was not such a plot as the officer certifying it had a right make, so as to render it proof against parties who had no notice in relation to it, and that no plot can be admitted in evidence, which is not made un-

der an order of court, and the parties to be affected, thereby, notified of the time of making the same.

There arises frequently, in the inferior courts, confusion, in relation to the introduction of plots of survey in evidence; and that confusion, and the errors consequent thereon, proceed from giving them a higher degree of importance than they are, in fact, and in law, entitled to; and from not distinguishing the use that may be made of them, in applying testimony, instead of considering them proof in themselves. Nothing can be clearer, than that what is said, and done by third parties, cannot be evidence for or against those who are litigating their rights before a court of justice. It follows, therefore, that a representation in the form of a plot presenting to the eye, a picture, as it were, of that which has been done by others, cannot be evidence. But although not legal proof, it may be used by the parties to explain the evidence, and the court to apply it. When witnesses give testimony how lines run, and how they intersect and interfere with each other, it is almost impossible to understand them without a diagram, which will enable those who are called on to decide, to follow with the eye the testimony

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that is received in relation to them. Hence it is, that in almost all contested cases of this kind, courts direct surveys to be made; not, as is frequently supposed, in the intention that the lines which the surveyor may run, and represent on paper, at the desire of either plaintiff or defendant, should be evidence; but to enable the court to understand and apply the proof, which either party may produce, in support of the lines contended for. The notice generally directed to be given of the time and place of making these surveys, is to enable the parties to have their pretensions exhibited, and to enable them the better to detect any errors into which their adversary may fall. But though such a direction is extremely proper, when the making of the survey is within the controul of the court, it does not follow that one executed without notice, may not be referred to, to enable an application to be made of the proof given in relation to those lines, when there is evidence before the court, that these lines are faithfully delineated on the plot.

When the survey issues with the title, or afterwards, if it makes a part of it, it becomes evidence, under another rule. But with this exception, no survey is proof *per se*, against par-

ties in a court of justice, unless it appears, they have assented to it, as containing the truth. In this case, the survey which made no part of the title, was admitted to go to the jury as evidence for the defendant, and against the plaintiffs, and in this we think there was error. The representation made in the office books of the United States, of the stream on which the *locus in quo* was situated, and the manner in which the adjoining titles were located, was not proof against the plaintiff; it was *res inter alios acta.*

The next question to be examined, arises out of an exception to the opinion which the judge expressed to the jury in relation to the defendant's plea of prescription. He charged the jury "that the right of pre-emption under the act of congress of 1814, vests such a title from the date of it as may be the basis of a ten years' prescription, this opinion grows out of the views of the supreme court upon a like plea, under the act of 1805."

The act of congress, which, in the opinion of the judge formed a proper basis for prescription, provides that every person, or the legal representatives of every person of certain settl-

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ers therein described "shall be entitled to preemption in the purchase thereof, under the same restrictions, conditions, provisions, and regulations, in every respect as directed by the act," &c., &c., 1 *Mart. Dig.* 352, *sect.* 5.

To enable the prescription of ten years to be successfully pleaded, there must be possession, good faith, and just title. The latter is designated to be that which in its nature, is translative of property. Tried by that test, this law does not confer a title; it only holds out to the party, a right ro acquire one. It gave him an opportunity to obtain one if he chose, but made his right depend on his giving his assent, and paying the price. The case cannot be distinguished from an offer from an individual to sell, with a promise not to sell for a certain time, to another, where it is clear that he to whom the proposal is made, is not the owner until he closes with the offer. The promise to sell, only amounts to a sale when there exists a reciprocal consent of both parties, as to the thing, and the price, nothing here shews the consent of the defendant, until the time when he entered the land, and paid the purchase money. *C. Code*, 346, *art.* 9.

The case decided by this court, under the

act of 1805, though alike, is not the same.— There, the act of Congress gave a title to settlers who had an inchoate right under the Spanish government. Nothing was to be done by the individual in possession; it was not, as in this, conferred if he paid the price, but because he had already settled and occupied. The moment the law passed, the possessor had a right to consider himself the owner; the certificate he might afterwards obtain, was but the evidence of it. That act of congress gave the title; this gave it, if the party in possession, chose to purchase. In the case referred to, we said, nothing depended on a condition to be accomplished *in futuro*. Here, every thing material did, and that condition was, an assent to the offer to sell, and the payment of the price.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to the district court, with directions to the judge *a quo* not to admit the plot of survey marked T, and not to charge the jury, that the defendant has a good title by prescription under the act of congress of 1814;

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and it is further ordered, adjudged, and decreed, that the appellee pay the costs of this appeal.

Scott for the plaintiff, ***Boyce*** for the defendant.

JOHNSTON vs. *KIRKLAND & AL.*

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, executor, and instituted heir to his wife, states that Kirkland, grandfather, tutor and curator, to the testatrix, and her three sisters, on the decease of their parents, took possession of the estate, and administered it; that a partial partition took place in the life time of the testatrix, in which she drew a lot of inferior value, and her co-heirs became indebted to her for a sum of money equal to the difference in value of her share.

The prayer of the petition is, that a final settlement may take place, that the amount in Kirkland's hands, and the individual balance of the estate may be partitioned, and that the plaintiff may have his deceased wife's share.

Kirkland pleaded the general issue, averred

himself the forced heir of the testatrix, as her grand-father, that the will was void, not being made with the requisite formalities of law, that one of the testatrix's sisters died, and he became as her grand-father, entitled to her share of the estate, as she left no issue, nor father or mother.

The other defendants, the testatrix's co-heirs, pleaded also the informality of the will, that according to the will of her great-grand-father, she could not dispose of the estate she derived from him.

The plaintiff had judgment, and the defendants appealed.

The appellee complains of the judgment, as it does not allow her interest in the property partitioned, it being land and slaves, which produce fruits.

We think the will was duly proved in the parish of Orleans, as she died there, and the will and testimony shew the principal part of the estate was in the state of Mississippi. The requisite formalities appear to have been complied with.

The new code recognizes the father and mother only, as the forced heirs in the ascending line—the former recognised as such all the ascendants; and it is contended that the two

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provisions may stand together, and a repeal of the former provision cannot be presumed. Whatever may be the rule in ordinary legislation, we have evidence that in the formation of the new code, this presumption is destroyed. The jurists who proposed the amendments in their report proposed the substitution of the words *father and mother* for *one or several legitimate ascendants:* now it cannot be imagined, the legislature meant the two provisions should stand.

The will of the great-grand-father was made in South Carolina; it is not attended with the formalities required in this state to make a good will—and no evidence is produced of the law of South Carolina in this respect. It is a nuncupative will, and has but three witnesses.

The right of Kirkland to the estate of the deceased co-heir, was disallowed by the arbitrators to whom the case was submitted; this award became the judgment of the court in which the suit was pending, and the judgment has become *res judicata.*

The claim of the appellant to interest, though raised in argument, made no part of his answer to the petition of appeal.

On the merits, we think justice was com-

pletely done. It is therefore ordered, adjudged and decreed that the judgment be affirmed with costs.

Scott & Flint for plaintiff, *C. T. Scott* for defendants.

NANCARROW vs. *WEATHERSBEE.*

APPEAL from the court of the seventh district.

MATTHEWS, J. delivered the opinion of the court. This suit is brought to recover a tract of land alleged to be wrongfully withheld by the defendant from the plaintiff. The cause was submitted to a jury in the court-below, who found a verdict for the defendant, and judgment being thereon rendered, the plaintiff appealed.

Both parties to the suit claim title to the property in dispute, as derived from the same original proprietor. The appellant claims under a deed of sale directly from said proprietor, and the defendant by virtue of a sheriff's sale of the land, made in collection of taxes. The deed to the plaintiff is dated in 1821, and that of the sheriff in 1814, in consequence of a sale for taxes, said to have been due for the preceding year.

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A correct decision of the cause depends on the validity and legal effects of the sheriff's deed. The objections made to it, are, want of authority shewn in the officer to sell; and a deficiency of proof to shew that he pursued all the measures required by law to give validity to the alienation of the property by him sold. The land was sold as the property of the Baron de Bastrop, under which both parties claim as above stated. According to our laws on the subject of taxation, it is necessary that an assessment should be made in the manner pointed out therein, and transmitted to the collectors of taxes before they can proceed to make collection. By this assessment the amount which each individual citizen is bound to pay for the public benefit, is definitely fixed on each and every part of his real property. It is in so many words the authority on which a collector proceeds to demand and enforce the payment of taxes; and in this respect may be viewed as analogous to an execution issuing on a judgment. Now in order to support a sheriff's deed made for property sold under execution, the party relying on such deed is bound to shew a judgment and execution. It is indeed a general principle of jurisprudence, that the

authority, by which an individual assumes to act for another, in the disposition of the property of the latter, must, when questioned, be shewn.

In the present case, the record exhibits no evidence of any assessment of the land, which was sold by the sheriff, or any other authority under which he acted. We are therefore of opinion, that in relation to the original proprietor and those claiming directly under him, the sheriff's deed is void, for want of proper authority, shewn to have been vested in the officer who sold. See in relation to assessment. 1 *M Digest, p.* 106, *No.* IX *&* X.

The conclusion to which we have arrived on the first objection to the validity of the defendants' title, renders it unnecessary to examine the second. Prescription is pleaded by the defendant; but the record furnishes no evidence to support it.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the court below be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee, the tract of land claimed in his petition, with costs in both courts.

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Scott for plaintiff, *Downs* for defendant.

STOKES vs. *STOKES.*

A decree of partition cannot be appealed from. The partition must be made and homologated, to authorise an appeal.

APPEAL from the Court of Probates.

MARTIN, J. delivered the opinion of the court. This is an appeal from the judgment of the Court of Probates, decreeing partition of the estate, and that the plaintiffs have one half of the property, in the possession of their father at their mothers' death, and the defendant one half of the acquests and gains, during the marriage—the balance of the estate to be divided among all the children.

This is no final judgment—for the partition must be made afterwards and homologated.—*Civil Code* 1296–9. 'Till the homologation then every party has a right to draw the attention of the Court of Probates to any injury done him.

Were we to affirm the judgment, the case might return to us a second time; this would create delay. We think the appeal was premature; it is therefore ordered that it be dismissed with costs.

Paterson for plaintiffs, *Scott & Dorsey*, for defendant.

HUNTER vs. *SMITH.*

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APPEAL from the court of the sixth district.

A party may use as evidence, any document filed in the case.

The handwriting of a clerk who is dead, in entries in his employers' books, may be proven.

A party who has taken no step to bring in a witness, cannot use his testimony taken down by the clerk in another case.

MARTIN, J. delivered the opinion of the court. This case came up to this court, in October, 1824, and was remanded. The plaintiff had a verdict and judgment, and the defendant appealed anew. *Vol.* 3, 109.

The counsel of the appellant relies on a number of bills of exceptions:—

1 & 2. The two first are to the opinion of the district court, who allow the introduction in evidence of an account of Armstrong, against the defendant, paid by the plaintiff for the latter, and filed among the papers of the suit by the defendant—and the testimony of Armstrong—the introduction of sundry due-bills, the signatures of which were torn off, and which had also been filed by the defendant, and the testimony of Oliot, in relation to those due bills.

The plaintiff sought to disprove the facts stated by the defendant, in answer to interrogatories. For this purpose, the testimony of any disinterested witness was proper, and he might use any document placed by the defendant himself on the files of the court, in the case, for his defence.

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3. Another bill was taken to the opinion of the court, allowing proof of the hand-writing of a clerk of the plaintiff, now dead, or entries on the plaintiff's books.

This instance is stated in all the elementary books of evidence, to illustrate the cases in which the plaintiff may prove his claim by entries when on books. The plaintiff has relied on 3 *Martin*, 188, Cavelier *vs.* Petit. *Civ. Code*, *art.* 2244; but these authorities are evidently inapplicable.

4 & 5. The two next bills were to the admission of evidence of the former existence of notes of the defendant, payable to the plaintiff, and to that of payments made by the latter for the former. The objection was made on the ground of irrelevancy; these notes and those payments making no part of the plaintiff's claim.

It appears the averred object of the plaintiff was to establish the manner he had accounted for cotton sold by him for the defendant, and in what way the latter had acquiesced to a credit which he claimed. For this purpose, the evidence was clearly proper.

6. Another bill was, to the admission in evidence of what the parties had said in a con-

versation relating to the quantity of bales of cotton made by the defendant.

What has been said on the preceeding bills is equally applicable to this.

7. The last bill is to the refusal of admitting in evidence, the testimony of a witness, taken down by the clerk during a former trial in the present case.

The defendant had taken no steps to bring the witness, who resides in the parish, and the plaintiff had a right to insist on the witness being *seen* and *heard* by the jury.

The plaintiff made an unsuccessful effort to obtain a new trial, on the grounds of the verdict being contrary to law and evidence, of surprise, and lastly, on an allegation that the jury had considered it was not their duty to weigh the evidence, or take the answer to the plaintiff's interrogatories as conclusive evidence.

The first and second grounds are particularly left to the discretion of the district court, who has better opportunities to be informed.

It is true that when a fact is denied by the party in answer to interrogatories, the answer must be taken as true, unless disproved by two credible witnesses, or one with corroborating

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circumstances; it is also true, that when the law, by arbitrary appointment, annexes to particular evidence, force and efficacy, beyond what naturally belongs to it, a jury are bound by the rule of law, even in opposition to their own conclusion, as to the truth of the facts, from all other circumstances. *Starkie*, 445.

But in the present case, the plaintiff introduced testimony and documents to disprove the facts sworn to by the defendant, and the jury were the proper judges of the weight of the circumstances resulting from these documents.

On looking over the whole evidence, we are unable to say the verdict ought to be disturbed as contrary thereto; and it is not shown to be contrary to law.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Thomas for the plaintiff, *Boyce* for the defendant.

SPENCER'S HEIRS vs. *GRIMBALL.* Western Dis. *October*, 1827

APPEAL from the court of the sixth district.

PORTER, J. delivered the opinion of the court. This case, with several others, growing out of the same subject matter, and involving the same questions of law, have stood for several years on the docket, owing to one of the judges of this court having an interest in them, and another, while at the bar, been employed as counsel for the plaintiffs. A late act of the general assembly, has removed the objection which existed to the latter, and after a full discussion they are now presented for decision. The member of the court who is on this occasion, the organ of its opinion, would have gladly declined taking any part in these causes; but the legislature having declared that being once the advocate of a suitor in our courts, is not a disqualification from becoming his judge, he is no longer permitted to consult his own feelings. He has however, endeavoured, and he hopes he has succeeded, to discard all former impressions, and abandon any previous opinions which grew out of the different relation in which he once stood to the parties. In the accomplishment of this desire he has been aided by the

Under the former government of Louisiana, a sale by Indians, of land assigned to them, did not incapacitate them from acquiring a right to soil in land to which they removed.

If a sale by the Indians was followed by payment of the price, and delivery of the property, no person can take advantage of an informality in the mode of making it, but the Indians. The nullity is relative.

The proviso in the act of congress, that under *no one claim* shall any person be entitled to more than a league square, applies to the caims under the Spanish government, not to *the claims* made before the board of commissioners.

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great length of time which has elapsed since his mind was at all turned to the subject; and by the able argument at the bar, which has placed the principal questions of the case, in every light of which it is believed they are susceptible.

The suit is one for land. The title of the plaintiffs is derived from certain persons called Millar and Fulton, who, previous to the change of government, bought from the Chocto, Pascagoula, and Belloxi tribes of Indians, all the land owned by them on the Bayou Bœuf. The defendant claims the premises in virtue of a purchase from the United States. As he is in possession, he has availed himself of the legal right of persons so situated, which enables them to force their adversaries to recover on the strength of *their* title; and he has made various objections to that of the plaintiffs.

These objections may be reduced under the three following heads:—

First—That the Indians had no title in the land to sell.

Second—That they did not sell.

And *third*, and lastly, that if they did, the property which they could legally dispose of, did not embrace the *locus in quo.*

The first of these questions can scarcely be

considered an open one in this court. It has already been decided in the cases of *Reboul* vs. *Nero*, and *Martin* vs. *Johnston*, that tribes of Indians, to whom lands were allotted by the Spanish officers of Louisiana, in pursuance of the laws of the Indies, acquired a legal title to the soil. That they were in every respect as completely owners of it, as those who held under a complete grant, although being considered in a state of pupillage, the authority of the public officers, who were constituted their guardians, was necessary to a valid alienation of their property. Of the correctness of these decisions, we have no doubt, and we deem it sufficient to refer to those laws of the Indies on which they were professedly based. 5 *Martin*, 655. *Ibid.* 490. *Recop. de las Indias, lib.* 4, *tit.* 12, *l.* 13, 8.

But it is contended that no right was shown in the Indians to settle in one part of the country, and after settling there, to move off and place themselves on other portions of the domain, and dispose of that too, as soon as a real or fancied necessity, or caprice, might urge them to such a measure. That the Spanish laws did not confer on them any such privilege, and that the exercise of it would have been incom-

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patible with complete sovereignty over the soil, because in this way the whole right of the nation in it might be lost. This objection appears to us of little weight when considered in relation to the laws and the policy of the country by which its validity must be tested. Spain appears to have felt earlier than any other European nation, the wrongs inflicted on the original inhabitants of this continent, and her legislation bears repeated and anxious marks of her desire to repair the injuries her ambition and cupidity had occasioned. Whether she was defeated or not in this laudable purpose by the neglect of her subordinate agents, cannot affect the argument in a court of justice. Her indulgence to those tribes of Indians who survived the conquest; her liberality, or rather justice in allotting to them particular portions of the soil she had wrested from them, and her care to make these acquisitions of value, by preventing the intrusion of white settlers, are proved by various laws, passed at different times, for the government of her colonies in America. One of these laws meets the very objection taken in this case, and directs, that when the Indians give up their lands to the whites, others shall be assigned to them

porque a los Indios se habian de senalar y dar tierras, y aguas, y montes, si se quitaren a Espanoles, se las dan justa recompensa en otra parte. Recop. de las Ind. liv. 6, *tit.* 3, *leg.* 14. It is true this law does not specify in what mode the Indians must abandon, to enable them to enjoy this advantage; it cannot however be presumed it was in the contemplation of the government to permit them to make donations of their lands to the Spanish settlers. But, be that as it may, the expressions used, do by no means authorise this court to say, that the act of the Spanish governor assigning the lands now in dispute was null and void, because they had already sold a place previously given to them. And at all events, this was a question between them or their assignees; and the general government of the United States have waived the objection by confirming (as it will hereafter be shown they have done) the alienation made by the Indians.

II. Considering, therefore, that it is perfectly clear, a title to the soil was vested in the vendors of the plaintiffs, which they might sell; whether they have sold or not is the second question in the order in which we have stated the objections made to the plaintiff's right of recovery.

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The objections taken on this branch of the subject by the defendant, went both to the sale made by the Choctо tribe of Indians, and that jointly executed by the Pascagoulas, and Beloxi. But a slight attention to the relative situation of the different tribes on the bayou, will shew that the validity of the sale of the former cannot be called in question between these parties in this suit. According to the evidence, the Choctos were placed highest up on the stream; the Pascagoulas next below, and the Beloxis below them. Millar and Fulton bought by two distinct instruments of writing, the right and title of the three nations. The land claimed by the plaintiffs is embraced within the lowest part of this purchase, hence, if they have any right, it must be under the Beloxi tribe; consequently, whether the Choctos have regularly sold or not, may be dismissed from our consideration, as totally unconnected with the case before us.

The Pascagoulas and Beloxis sold by one public act. It was passed before the Commandant of Rapides, and afterwards approved by the Governor of Louisiana. The price agreed on appears to have been paid, and possession was delivered. The defendant con-

tends the plaintiffs have no right to recover from him, even admitting the Indians could, because, by the laws of Spain, their lands must be sold at auction. The plaintiffs reply that this informality, if it be such, is one of which the defendant has no right to avail himself. That the Indians can alone claim the benefit of it.

This question was discussed and decided in the case of *Martin* vs. *Johnston*, and the defendant is wholly in error in supposing that because there, the Indian title was presented by a defendant in possession, and here by a plaintiff seeking to obtain it, that the authority of that decision has no application to this case. The plaintiff there shewed a legal title to the premises, which compelled the defendant to establish one in himself; in doing so he was *actor* and every objection was open to his adversary, that would have been if Martin had been in possession, and Johnston plaintiff. But, as the correctness of the decision to this extent has been strongly impugned, it may be as well to look at the subject a little more closely. It involves, in its examination, the doctrine of what is called in our jurisprudence, *absolute* and *relative* nullities; one which though clear enough

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in relation to those extreme cases, which suggested the distinction just stated, frequently occasions great embarrassment in its application, from the difficulty of distinguishing satisfactorily, under which head of nullity the objection falls. It is believed, however, that little can exist in relation to the case before us. Some of the writers on our law of the very highest authority, are of opinion, that it is only such nullities as grow out of prohibitions, having for their *first and principal object*, reasons of public utility, that strangers can set up in their defence; and that whenever the nullity is pronounced by the law more in relation to the individual, than the public, the party intended to be protected can alone claim the benefit of it. Others of equal celebrity reject the distinction, and think, that whenever the contract claimed under, is *declared* null for want of certain formalities, that no person can claim title under it. Which of these doctrines we should incline to adopt, this case does not require us to say, nor have we any opinion formed on the matter. Taking the principles contended for by those who have pushed the doctrine the farthest, in support of the pretension set up by the defendant, the defence cannot avail him. In

argument, his counsel correctly assimilated the incapacity under which the Indians were placed, to that to which minors are subject, and it was urged that a sale of the property of the latter was null and void, if not made with the formalities prescribed by law. *Toullier*, among others, puts the very case of a minor selling informally, as a voidable, not a void contract, of which the nullity is only relative; though he states, it would be different, if a forced sale, or one made by his tutor, did not pursue the forms prescribed by law. A moment's consideration as to the consequences that follow a contract with a minor, will show how sound this doctrine is. In the first place, the party contracting is bound to the same extent as if he had bargained with a person of full age. The minor, himself, too is bound, if, after arriving at the age of majority, he expressly, or impliedly approves of the alienation, or suffers the time within which he may rescind it, to elapse without bringing an action to set it aside. An agreement which may produce such effects, cannot be considered *null;* it is only *voidable*, and no one can *avoid* it, but him whom the law intended to protect. The consequences of a contrary rule would be, that a third party, by getting

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possession of property to which he had no right, might have a contract declared null which the minor, for whose benefit the protection was given, would affirm when he came of age. Into such an absurdity, this court cannot permit itself to be led. *Invito beneficium non datur* is as well the maxim of law, as it is of common sense, and if the party who is empowered to set aside a contract, does not choose to do it, no other can. This case shows most strikingly, we think, the justness and propriety of the rule we have been endeavouring to explain. —The contract was complete—there was thing—consent—price paid—and possessson delivered. Whether the tribe of Indians who sold, have been swept away and extinguished by the advancing tide of civilization, or whether some remnants of them do not still exist, the record does not inform us. But in either hypothesis, the consequence is the same, or nearly so. In the first, they have left no representatives, and the recision of the contract never can be demanded. In the last, a quarter of a century has now elapsed, without any attempt on their part to annul the sale. With what propriety, then, can a third party seek to have it avoided? and how can he be permitted

to avail himself of such privilege, when every presumption arising out of the facts of the case, compels the belief, that the parties whose right he wishes to enforce, either never can, or never will, enforce it themselves? *Toullier, Droit Civil Francais, vol. 7, no. 553, art. 561 and 564. Dunod, traite des Pres. par. 1, cap. 8, 47. Nouveau Repertoire de juris Verbo Nullite, sec. 2 & 3.*

III. The last and the most difficult question in the case, is that which relates to the location of the titles under which the plaintiffs claim. It has been already stated that they derive their right from Millar and Fulton, who purchased from three tribes of Indians. The Choctos were first placed on the bayou Beuf; the Pascagoulas and Biloxis, last. The upper boundary assigned to the Choctos was the bayou Robert; the lower does not appear to have been positively fixed. When the Spanish officer located the Biloxis and Pascagoulas, altho' they were distinct and separate communities, he gave them a joint possession, and assigned them land from the lower boundary of the Choctos, down to the mouth of the bayou Crocodile. The whole of these proceedings exhibit a great deal of that looseness and irregularity which

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characterize the acts of the Spanish officers in Louisiana. Both the commandant and the Governor seem to have been ignorant, or if not ignorant of, to have entirely disregarded the laws of the Indies, which limit the quantity of land each tribe was entitled to: for the space assigned to the Pascagoulas and Biloxis, far exceeds that which under the most liberal construction of those laws they should have received. But the irregularity which arose from the acts of the officers of the government, is not the only difficulty the case presents. The Indians settled so near each other that there is not a league from each village. Under these circumstances, the argument of the case exhibited a great diversity of opinion as to the true location. The counsel for the plaintiffs have not been able to agree themselves on the proper one. The defendant contends for boundaries which would place him far out of the limits of the Indian title.

Before examining the grounds assumed by the defendant on this point, it becomes necessary to notice and dispose of these taken by the plaintiffs. Their first proposistion appears to us quite untenable. They have contended that by the local usages existing in Louisiana, the

Indians were entitled to more than a league; and the evidence they offer of these usages, is the assent of the Governor to a sale, by which much more was sold by one tribe. Respect is certainly due to the official acts of the officers of the former government, and in the absence of proof to the contrary, we should be inclined to consider them *prima facie* correct. But in relation to the subject matter before us, we have the law itself, which clearly limits the quantity to which Indians were entitled. Now for us to say, that a violation of that law was an evidence of an usage which controuled it, would place all laws at the mercy of those who owed them obedience.

Some of the counsel who have advocated the rights of the plaintiffs in the several causes now before us, which have grown out of the purchase from the Indians, have urged that the law only gave the superficies embraced within a square league to each tribe. Others have contended that they were entitled to a league in every direction round their village. It is unnecessary for us to decide this point, for according to the evidence, a league from the lowest village on the bayou, which was that of the Biloxis, would not reach the land claimed by the defendant.

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The Choctо Indians who were first placed on the bayou Bœuf, had laws assigned them from the place where the bayou Robert enters into it, down to the spot occupied by them as a village. This space was about one league Previous to their sale to Millar and Fulton, they had sold to other persons portions of this soil, and their upper limit at the time the former purchased, was near the confluence of the bayou Clair and bayou Bœuf, at a place represented on the plat of survey by the letters C. B In their act of sale to Millar and Fulton, they state, that they sell the villages and fields granted them by the Baron de Carondolet, and that they do this in the presence of the Biloxi and Pascagoula Indians, who give them a sufficient portion of *their* land *to make up* the village and fields. The boundaries given in this sale are a sycamore tree above, and two sweet gums below, adjoining the lands of the Pascagoulas. In the sale from the Biloxis and Pascagoulas, it is declared that they sell from the Choctо village above, down to a limit on the bayou, which will embrace all the lands granted to them. On these facts the defendant contends that the Choctos having sold nearly all the soil belonging to them, previous to the ali-

enation to Millar and Fulton, and no evidence being given of a new assignment to them of any land below, that their *lower limit* must be the village. That this conclusion is strengthened by the Pascagoulas and Beloxis calling to bound the land sold by them on that village. And that in all events, all who claim under Millar and Fulton cannot contest this argument, because they acknowledged, in accepting a sale from the Choctos with that boundary, that their title did not extend any further down the bayou; and afterwards purchased from the other tribes; and in the deed of conveyance, admitted that the lands acquired from the Pascagoulas and Beloxis, joined upon that village above.

We trust, that this is not a weak summary of an argument which was strongly pressed on our attention on the hearing; if correct, the two leagues which the Pascagoulas and Beloxi tribes could legally dispose of, would not come near to the *locus in quo*. But whether the position assumed would be tenable or not, if the plaintiffs relied solely on the title from the Indians, we need not inquire. The question assumes a very different aspect, when they present themselves under the confirmation of the United States.

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In the notice filed with the commissioners appointed by the general government to pass on the validity of land titles in Louisiana, the persons under whom the plaintiffs claim, demanded a confirmation of their title to 46,800 arpents of land on both sides of bayou Bœuf, in virtue of purchases made from the Choctо, Pascagoula and Beloxi tribes of Indians. These commissioners after hearing evidence in support of the demand thus made, recommended a confirmation of it to the extent of 23,400 arpents. In their report, they divided the different claims on which they had passed into distinct classes, according to their dignity, designating them by different letters of the alphabet: that in relation to the Indian title was marked B. The act of Congress confirming the report, is in the following words, "the claims marked B, and described in the several classes in the reports of the commissioners for the western district of the state of Louisiana, formerly territory of Orleans, and recommended by them for confirmation, are hereby confirmed. *Provided nevertheless*, that under *no one claim* shall any person or persons be entitled under this act, to more than the quantity contained in a league square." *Ing. Dig.* 537.

It becomes necessary to enquire what was meant by the legislature in using the term *one claim*:—to ascertain whether the limitation was affixed to the claim set up before the commissioners, or to the claim under the Spanish government, in virtue of which the demand had been made. It cannot be doubted we think but the latter was intended, and that this results as well from the phraseology used, as from the reason of the thing. If the intention of Congress had been, that no person should obtain more than a league square of land, no matter how many original titles emanating from the Spanish government he had acquired by purchase or otherwise, the language proper to express that idea would have been resorted to, and the act would have declared that *no claimant* should have more than one league. Instead of that the expressions are, that under *no one claim* shall any person or persons be entitled to more than the quantity contained in a league square. If under *more* than one claim, the consequence therefore, not necessarily, but strongly is, that they may have more.

Again, by the terms *under one claim*, is clearly meant the title from the former government *under* which the demand for confirma-

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tion was made. To apply it to the claim put in before the commissioners, would be admitting, that Congress intended to grant lands in consequence of the claim made to them, instead of the claim or titles which existed for them under the former government.

The language is so clear, that there is scarcely a necessity for resorting to the other rules which aid courts of justice in the interpretation of statutes. But if we recurred to one of them, the construction we have given would be greatly strengthened. It is well known that no inconsiderable part of the soil of Louisiana is covered by large grants, in regard to which the government of the United States has hitherto exhibited great jealousy. If the word *claim* in the act of Congress should be held to apply to the derivative title, instead of the original grants, *they* would have been confirmed by this law, for all portions of them which the grantee might have sold to an extent not exceeding one square league. That such was not the intention of Congress, we believe cannot be questioned. And these observations suggest the idea, that it was still less their intention to limit the rights of purchasers who held under titles that were good by the laws of

Spain. The instances were numerous at the change of government, of land originally granted out in quantities less than a league square to different individuals having centred in one person who had legally acquired them through purchase, exchange, or the other modes by which property is transferred. If these titles were all good, and proper objects of confirmation, had they remained in the hands of the grantees, no possible reason can be given why they should not be good to those who held under them. And to say, that because the latter inserted all these demands in one notice, or one claim, before the commissioners, they could only have one league, while the persons under whom they claimed would have obtained a confirmation to the whole extent of their titles, would be supposing Congress to have objections to the claimant instead of the title. Nay, it would involve a greater absurdity. For admitting the claimant to have acquired six square leagues, under so many different titles, if he had filed separate claims for each, the limitation in the act would have given him the whole quantity: but if he had embraced them all in *one claim* before the commissioners, he would only have had a league square.

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If the foregoing observations be correct, Millar and Fulton's title was confirmed to the extent of three leagues, for they claimed under three distinct titles, existing under the Spanish government: namely, one in favour of the Choctos, another in favor of the Pascagoula, and the third in favor of the Beloxi tribe of Indians.

In the preceding opinion, we have dwelt more at length on several parts of the case than their difficulty or importance rendered necessary. But situated as the court is in the decision of this cause, we were unwilling to assume any thing, or state any conclusion, without stating at the same time the reasoning by which we arrived at it, and the premises on which that reasoning was founded.

It now only remains for us to ascertain how far the defendant interferes with the rights of the plaintiffs under the confirmation of three square leagues. The surveyor swears, that three leagues from the sycamore tree (which was the upper boundary given by the Choctos in the sale to Millar & Fulton) will not enter into the improvement of the defendant by one arpent. But he adds, this measurement was made without regard to the superficial contents of the survey, which, if observed, would give the

lines a greater length, and consequently extend the line further into the claim of the defendant. According to the notes which accompanys the plot of survey returned into court, a line designated thereon by the letters R F T S is stated to include the quantity of three leagues between it and the sycamore stump, if the land is surveyed so as to give 40 arpents on each side of the bayou. This mode of laying off the land is agreeable to the constant usage under the French and Spanish governments, and to the report of the commissioners, who confirmed the claim to the extent of forty arpents on each side. The limitation in the act of congress is to quantity, and leaves the manner of location indicated in the report, untouched.

The line already referred to, embraces a part of the land claimed by the defendant, and to the extent of that interference, the plaintiff must recover; but we cannot give a final judgment, for the evidence does not inform us of the extent of that interference. The district court decreed that the plaintiffs should recover all the land which might be included within certain lines, while the judgment, to be susceptible of execution, ought to have ascertained the exact quantity within those lines, otherwise, a new

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suit might arise from alleged errors in the sheriff carrying the decree into effect.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; that the case be remanded for a new trial, and that the appellee pay the costs of this appeal.

Scott & others for the plaintiffs, *Wilson* for the defendant.